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Access Deferred is Access Denied [In re Search Warrant for Secretarial Area Outside Office of Thomas Gunn, McDonnell Douglas Corp., 855 F.2d 569 (8th Cir. 1988)]

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ACCESS DEFERRED IS ACCESS DENIED

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INTRODUCTION

For there is no one who does anything in secret if he seeks to be known openly. If thou do these things, show thyself to the world.

—John 7:4

On June 14, 1988, following a covert investigation spanning several years, a multitude of federal agents moved in concert at locations throughout the nation, to issue "ambush" subpoenas to many of the country's primary defense industry officials and contractors.[1] Dozens of subpoenas were issued simultaneously to ensure the government's element of surprise, eliminate possible destruction of evidence, prevent witness collaboration on alibis and explanations and, presumably, to capture the attention of the public and the press.[2] The latter it unquestionably did.[3] Angered for years by stories in-

1. *See* Rosenbaum, *Pentagon Fraud Inquiry: What Is Known to Date,* N.Y. Times, July 7, 1988, at 1, col. 3. *See also* Satchell, *The Enemy Within*, U.S. NEWS & WORLD REP., July 4, 1988, at 16–21. U.S. Attorney Henry Hudson worked with a team of eight prosecutors, 78 FBI agents and 15 investigators from the Navel Investigative Service to coordinate the secret study which resulted in issuance of over 300 subpoenas nationwide. The warrants included government officials and major Defense Department contractors and personnel. For a list of the persons and contractors for whom warrants were issued see *In re* Search Warrant for Secretarial Area Outside Office of Thomas Gunn, McDonnell Douglas Corp., 855 F.2d 569, 577–78 (8th Cir. 1988).

2. *In re* Search Warrant for Secretarial Area, No. 88-MISC-260, slip op. at 3–4 (E.D. Mo. July 15, 1988) (district court order for seal of affidavits and other materials in support of search warrants issued for the offices of two McDonnell Douglas employees).

3. *See Search Warrant*, 855 F.2d at 570 ("The nature and scope of the investigation and the dramatic manner in which the search warrants were executed attracted intense public interest and considerable news media attention."). *See also* Barry, *Payoffs at the Pentagon*, NEWSWEEK, June 27, 1988, at 20; Bock, *Drawing a Flak Attack*, TIME, July 25, 1988, at 58; *Defense Fraud Probe*, AVIATION WEEK & SPACE TECH., July 18, 1988 (special section); Dwyer, *The Defense Scandal: Why Justice May be Short on Firepower*, BUS. WEEK, Oct. 3, 1988, at 45; Forbes, *Perestroika for the Pentagon*, FORBES, July 25, 1988, at 29; Gee, *Scandal at the Pentagon*, MACLEANS, July 11, 1988, at 30; Griffiths, *To Cut the Pentagon Corruption, Cut the Bloated Bureaucracy*, BUS. WEEK, Aug. 22, 1988, at 38; *Keeping the Pentagon Honest*, NEW REPUBLIC, July 18, 1988, at 7; Magnuson, *The Pentagon Up For Sale*, TIME, June 27, 1988, at 16; Mecham, *Nationwide FBI Bribery Probe Centers on Defense Consultants*, AVIATION WEEK & SPACE TECH., June 20, 1988, at 20; Sandza, *Paisley and the Pentagon*, NEWSWEEK, July 11, 1988, at 31; and Satchell, *The Enemy Within*, U.S. NEWS & WORLD REP., July 4, 1988, at 16.

volving defense spending cost-overruns, waste and fraud, including the now legendary $350.00 screws, $700.00 toilet seat covers and $532.74 hammers, the American public was justifiably concerned with this new and purported sweeping investigation of alleged defense contracting irregularities totalling hundreds of millions of dollars.[4]

Despite the intense public interest in this matter of national importance,[5] information regarding some of the warrants was placed under court seal by the issuing courts.[6] Explanation and justification for the seals was characteristically nonspecific. However, national security, privacy, fair trial and ongoing investigation interests were all raised by implication.[7]

Government responses to requests for the warrant information were also placed under seal. Investigators maintained that continued secrecy was necessary during the pendency of the investigation.[8] Although the investigating authorities[9] had spent years researching and preparing for the simultaneous warrant issuance, they apparently felt an additional period of secrecy would allow them to more completely wrap up their study and issue any further warrants free of public scrutiny.[10]

The government asserted that the integrity of the investigation would be jeopardized by public disclosure of the warrant information. It further asserted the efficacy of the investigation superceded any public interest in the information.[11] The Court of Appeals for the Eighth Circuit agreed. In *In re Search Warrant for Secretarial Area Outside Office of Thomas Gunn, McDonnell Douglas Corp.*,[12] idealistic first

4. *See Search Warrant*, 855 F.2d at 574 (Heaney, J., concurring and dissenting). *See also* Mann, *U.S. Fraud Probe Rekindles Military Waste Controversy*, AVIATION WEEK & SPACE TECH., July 4, 1988, at 14; Rosenbaum, *supra* note 1 (author estimates the total dollars involved are in the "tens of billions").

5. "[T]he defense contract and procurement scandal in this country represents a public concern of great immediacy and magnitude." *Search Warrant*, 855 F.2d at 576.

6. Various officials involved with the investigation briefed congressional committees at length regarding the investigation. With the exception of affidavits filed by James B. Lamb, special agent for the FBI, and Joanne T. Burns, these records are not yet open to the public. The affidavits described the searches intended for the persons and premises of Mark C. Saunders and Joe Bradley. *Id.*

7. *See id.* at 575 (court declined to address the confidentiality issues raised by amicus briefs).

8. *Id.*

9. The FBI conducted the investigation together with the Naval Investigation Service. *Id.* at 570.

10. *See In re* Search Warrant for Secretarial Area, No. 88-MISC-260, slip op. at 3–4 (E.D. Mo. July 15, 1988).

11. *Search Warrant*, 855 F.2d at 574.

12. 855 F.2d 569 (8th Cir. 1988).

amendment rhetoric to the contrary,[13] the court of appeals held in favor of the government's request for secrecy and upheld a court seal on the search warrants and supporting affidavits filed in connection with warrants for two offices at the St. Louis-based McDonnell Douglas Corporation.[14]

Before affirming the seal, however, the court analyzed the question of access rights to pre-trial documents.[15] In keeping with recent Supreme Court decisions favoring court access, the court of appeals held that a first amendment right of access attaches to search warrants and supporting documents.[16] This issue of first impression[17] by the Court of Appeals for the Eighth Circuit, is not without controversy and the definitive statement on the pretrial document access issue.[18] Unfortunately, its refusal to give effect to the access right in the case at hand effectively reduces the "right" to a "privilege" status.

Absent a clear showing that the seal was the only method to address a compelling need for secrecy,[19] the court's ultimate denial of

13. Before denying access to the requested documents, Judge McMillan stated in the circuit court's opinion that a first amendment access right does indeed attach to search warrants and supporting documents. *Id.* at 573.

14. *Id.* at 570 (warrants issued and sealed for the offices of Thomas Gunn, Vice-President of Marketing at McDonnell Douglas, and his secretary, Linda Ogle).

15. *Id.* at 572–74.

16. *Id.* at 573 ("We are persuaded that the first amendment right of public access does extend to the documents filed in support of search warrant applications.").

17. Although the United States Supreme Court has held that there is a first amendment access right to trials and to pre-trial proceedings, it has not yet decided the question of whether there exists a constitutional access right to documents. The Supreme Court has, however, acknowledged a common law right of access to judicial records, the exercise of which is left to the sound discretion of the trial court judge. *See* Nixon v. Warner Communications, Inc., 435 U.S. 589, 597 (1978); *Public Access to Civil Court Records: A Common Law Approach*, 39 VAND. L. REV. 1465 (1986).

In a recent case implicating statutory rather than constitutional access guarantees, the Supreme Court refused access to FBI computer "rap sheet" compilations including both pre-trial and post conviction data. However, Justice Stevens noted that much of the information would be available directly from the arresting agencies and courts themselves since "[a]rrests, indictments, convictions, and sentences are public events that are usually documented in court records." U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press, No. 57 U.S.L.W. 4373, 4375 (U.S. March 22, 1989) (No. 87-1379).

18. In Newspapers of New England, Inc. v. Clerk-Magistrate, 403 Mass. 628, 634, 531 N.E.2d 1261, 1265 (1988), decided in late 1988, the Supreme Judicial Court of Massachusetts declined to find a first amendment access right to search warrant affidavits in a criminal case and specifically cited and disagreed with the Eighth Circuit's declaration to that effect in *Search Warrant*. Ironically, the Massachusetts court ordered the sealed warrants and affidavits released. *Id.* at 638, 531 N.E.2d at 1267.

19. The Court of Appeals for the Eighth Circuit acknowledges that the seal is appropriate only if " 'closure is essential to preserve higher values and is narrowly tailored to that interest.' " *Search Warrant*, 855 F.2d at 574 (quoting *In re* New York Times Co., 828 F.2d 110, 116 (2d. Cir. 1987), *cert. denied*, 108 S. Ct. 1272 (1988)).

public access to the traditionally open records for warrants and supporting pre-trial documents encroaches upon the significant first amendment interests of the public and of the press.[20] Denial of public access to information in a judicial and law enforcement matter of critical national concern conflicts directly with public policy and constitutional guarantees favoring an informed public.[21] Access to the judicial process is vital to the protection of civil liberties and should be available to the public unless there is a compelling need for secrecy.[22]

I. Historic Origins of Public Access to the Judicial Process

Access to the American court system by the public and the press is and has been the norm.[23] The common law tradition of access has been traced to practices prevalent before the Norman invasion of Britain.[24] At that time, cases were brought before local courts with

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"The party seeking closure or sealing must show that such restriction of the first amendment right of public access is necessitated by a compelling government interest." *Id.*

20. *Id.* at 573 ("[S]earch warrant applications and receipts are routinely filed with the clerk of court without seal. Under the common law, judicial records and documents have been historically considered to be open to inspection by the public.").

21. *Id.* at 573 ("[P]ublic access to documents filed in support of search warrants is important to the public's understanding of the function and operation of the judicial process and the criminal justice system and may operate as a curb on prosecutorial or judicial misconduct.").

22. The free flow of information is essential . . . to prevent . . . excesses of authority. As the complexities of modern society have increased, so too have the opportunities for abuse and, as long as mankind remains susceptible to the corrupting influence of power, so long will freedom of speech be essential as a vital check against this. The lesson of Watergate is clear. Freedom of speech and of the press must thus be regarded as one of the most crucial of human rights: for "the preservation of our liberties, the scrutiny of our laws and the maintenance of justice all demand constant vigilance" and only the free flow of information can safeguard this.

Jeffery, *Free Speech and Press: An Absolute Right?*, 8 Hum. Rts. Q. 197, 205 (1986) (quoting Sir Norman Anderson, *Liberty, Law and Justice*, The Hamlyn Lectures, Thirtieth Series, London, 1978, at 104).

23. *See* Press-Enterprise Co. v. Superior Court, 478 U.S. 1, 7 (1985) [hereinafter *Press-Enterprise II*] ("The right to an open trial is a shared right of the accused and the public, the common concern being the assurance of fairness."). *See also* Richmond Newspapers Inc. v. Virginia, 448 U.S. 555, 566–67 (1980), quoting E. Jenks, The Book of English Law 73–74 (6th ed. 1967) ("[O]ne of the most conspicuous aspects of English justice, that all judicial trials are to be held in open court, to which the public have free access, . . . appears to have been the rule in England from time immemorial.").

24. *Richmond Newspapers*, 448 U.S. at 564, citing Pollock, *English Law Before the Norman Conquest*, 1 Select Essays in Anglo-American Legal History 388–89 (1907).

mandatory attendance for all freemen of the region.[25] Following the Norman Conquest, jury trials became prevalent and the requirement for all to attend was relaxed, but not the public nature of the trials.[26] Attendance was an individual choice but was strongly encouraged. As the manual for one English court in 1313 explained, "justice should be administered indifferently to rich as to poor; and for the better accomplishing of this . . . pray the community by their attendance to lend their aid."[27]

Open court proceedings continued through the following centuries in Britain and became an integral part of the judicial process in colonial America.[28] The Journals of the First Continental Congress expound the virtues of an open judicial system indicating that a fair proceeding occurs "in open Court, before as many of the people as chuse to attend,"[29] a tradition continued by the new Republic.[30]

II. Supreme Court Delineates Access to Courts

The tradition was expressly incorporated in the United States Constitution in article III and the sixth amendment jury trial guarantees, the latter of which specifically states that a trial must be public.[31] The Supreme Court has also acknowleged an implicit guarantee of openness grounded in the first amendment rights of free speech and press.[32] In 1982, the Court stated, "Underlying the

25. *Richmond Newspapers*, 448 U.S. at 565, citing 1 Holdsworth, A History of English Law 10–12 (1927).

26. *See* Pollock, *supra* note 24, at 389.

27. 1 Holdsworth, *supra* note 25, at 268 (quoting Eyre of Kent, vol. i, p. 2 (S.S. ed. 1313)) (both cited in *Richmond Newspapers*, 448 U.S. at 560).

28. *See Richmond Newspapers*, 448 U.S. 555, 565 ("[T]hroughout its evolution, the trial has been open to all who cared to observe.")

> [I]n *all* publick courts of justice for tryals of *causes, civil or criminal*, any person or persons . . . may freely come into, and attend . . . and hear and be present, at all or any such tryals as shall be there had or passed, *that justice may not be done in a corner nor in any covert manner.*

1677 Concessions and Agreements of West New Jersey (reprinted in Sources of Our Liberties 188 (R. Perry, ed. 1959) and quoted in *Richmond Newspapers*, 448 U.S. at 567) (emphasis added).

29. 1 Journals of the Continental Congress 1774-1789, 107 (1904).

30. In the celebrated trial of Aaron Burr for treason, for example, with Chief Justice Marshall sitting as trial judge, the probable cause hearing was held in the Hall of Delegates in Virginia, the courtroom being too small to accomodate the mob of interested citizens. United States v. Burr, 25 F.Cas. 1 (No. 14,692) (CC Va. 1807) (referenced in *Press-Enterprise* II, 478 U.S. 1, 10).

31. Article III states: "The Trial of all Crimes . . . shall be by Jury. . . ." U.S. Const. art. III, § 2, cl. 3. The sixth amendment states: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial. . . ." U.S. Const. amend. VI.

32. In an interesting twist on the free press-fair trial controversy, where a *defendant* objected to *closure* of a suppression hearing, the Supreme Court stated that the hearing must remain open because "the explicit Sixth Amendment right of the ac-

First Amendment right of access to criminal trials is the common understanding that 'a major purpose of that Amendment was to protect the free discussion of governmental affairs.' "[33]

During the last decade, the Supreme Court has issued several landmark open trial, open records decisions following a somewhat less than linear or logical progression.[34] Taken as a whole, however, these cases clearly manifest the Supreme Court's acknowledgement of a common law right of access to both judicial proceedings and court documents.

A. Gannett

In 1979, the Supreme Court decided *Gannett Co. v. DePasquale*.[35] In this case, the Supreme Court addressed the concerns of various judges that open trials and press access were damaging rather than furthering a defendant's right to a fair trial.[36] Although the Court noted that the sixth amendment right to a public trial did not give a defendant a right to demand a closed trial, it nonetheless upheld an order issued three years earlier by Judge DePasquale, the trial court judge, closing a pretrial proceeding for a controversial murder case.[37]

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cused is no less protective of a public trial than the implicit First Amendment right of the press and the public." Waller v. Georgia, 467 U.S. 39, 46 (1984).

33. Globe Newspaper Co. v. Superior Court for the County of Norfolk, 457 U.S. 596, 604 (1982) (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

34. *See Press-Enterprise II*, 478 U.S. 1, 15 (1986) (press and public have right to attend voir dire); Waller v. Georgia, 467 U.S. 39, 48 (1984) (first amendment analysis applied to public right to attend pretrial suppression hearing); Press-Enterprise Co. v. Superior Court, 464 U.S. 501, 510–13 (1984) [hereinafter *Press-Enterprise I*] (seal and closure only allowable where trial judge articulates reasons in a written record and only where no less-restrictive means can secure the government interest); Globe Newspaper Co. v. Superior Court, 457 U.S. 596, 602 (1982) (legislation mandating closure of certain types of trials violated first amendment); Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581 (1980) (absent an overriding interest, closure of an entire criminal trial is impermissible); Gannett Co. v. DePasquale, 443 U.S. 368, 393 (1979) (denial of access is temporary because transcript of suppression hearing is available); Nixon v. Warner Communications, Inc., 435 U.S. 589, 602 (1978) (public has a presumptive right to government records under the first amendment); *In re* Oliver, 333 U.S. 257, 266 (1948) (criminal trials must be public). *Cf.* Seattle Times Co. v. Rhinehart, 467 U.S. 20, 37 (1984) (no abuse of discretion where newspaper prohibited from publishing information regarding trial to which it was a party). *See generally* Note, *The Free Press-Fair Trial Controversy: A New Standard for Closure Motions in Criminal Proceedings*, 38 ARK. L. REV. 403 (1984); Comment, *Constitutional Law: Standards for Public and Press to Attend Pretrial Proceedings*, 23 WASHBURN L.J. 675 (1984).

35. 443 U.S. 368 (1979).

36. Before *Gannett*, "judges [had] started closing courtrooms in order to protect an accused person's right to an 'impartial jury.' " D. SPENCER, LAW FOR THE REPORTER 190 (5th ed. 1980).

37. *Gannett*, 443 U.S. at 382. *Accord* Waller v. Georgia, 467 U.S. 39 (1984). *See generally* O'Brien, *The Trials and Tribulations of Courtroom Secrecy and Judicial Craftsman-*

The Court held that "members of the public have no constitutional right under the sixth and fourteenth amendments to attend criminal trials."[38] The Court did not decide whether there was a first amendment access right to criminal trials and stated that even assuming such right existed, the fact that a full transcript of the proceeding was available constituted satisfactory access.[39]

Although the Court had presumably been deciding only whether pretrial proceedings were subject to closure, the sweeping and unequivocal language was understandably interpreted by lower court judges to support closure of any number of court proceedings.[40] Acting with uncharacteristic swiftness, lower courts closed more than 200 trial court hearings in the year following the *Gannett* decision.[41] Confusion reigned and at least five of the Supreme Court Justices made public statements attempting to clarify the *Gannett* holding.[42]

B. Richmond Newspapers

In the aftermath of the *Gannett* decision, an entire criminal trial was closed by a Virginia trial judge.[43] The order for closure was affirmed by the Virginia Supreme Court. On appeal, the United States Supreme Court was forced to reconsider the impact of the *Gannett* decision issued the year before.[44] In *Richmond Newspapers, Inc. v. Virginia*,[45] seven members of the Court voted to reverse the Virginia Supreme Court which had supported closure of an entire murder trial following multiple mistrials and considerable publicity of the case.[46] Unfortunately, since the seven Justices holding for reversal issued six different opinions, *Richmond* is not the definitive statement on open trials that many would have liked.[47]

In addition to the ambiguous result, one important aspect of the *Richmond* decision is that all of the reversing Justices based their opinions on a first amendment access right rather than on common

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ship: Reflections on Gannett and Richmond Newspapers, 3 COMM. & L. 3, 13 (No. 2 Spring 1981).

38. *Gannett*, 443 U.S. at 391.

39. *Id.* at 392–93.

40. *Id.* at 391 ("[M]embers of the public and the press have no Constitutional right under the Sixth and Fourteenth Amendments to attend criminal trials.").

41. D. SPENCER, *supra* note 35, at 193.

42. *Id. See also* O'Brien, *supra* note 37, at 13.

43. D. SPENCER, *supra* note 35, at 193.

44. In deciding *Gannett*, the Supreme Court had avoided making a statement on first amendment access rights but had nonetheless based its opinion on the first rather than the sixth amendment. "This case would have been unnecessary had *Gannett* . . . construed the Sixth Amendment. . . ." Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 581–82 (1980) (White, J., concurring).

45. 448 U.S. 555 (1980).

46. *Id.* at 559–60.

47. *See* D. SPENCER, *supra* note 35, at 194.

law principles.[48] In his opinion, Chief Justice Burger wrote: "We hold that the right to attend criminal trials is implicit in the guarantees of the First Amendment; without the freedom to attend such trials, which people have exercised for centuries, important aspects of freedom of speech and 'of the press could be eviscerated.' "[49] Although Chief Justice Burger specifically withheld a decision on whether the open trial mandate applied to civil cases, he noted pointedly that "historically both civil and criminal trials have been presumptively open."[50]

Each Justice also noted that the access right was not absolute[51] and *Richmond* now generally stands for the principle that "absent an overriding interest articulated in the [court's written] findings, the trial of a criminal case must be open to the public."[52]

C. Globe Newspaper

The following year, in *Globe Newspaper Co. v. Superior Court*,[53] the Court provided some guidance as to what might or might not be an "overriding interest." In *Globe*, the Globe Newspaper Company challenged a Massachusetts law which mandated closure of all trials involving sexual offenses against minors.[54] The newspaper sought access to the trial of a man accused of the forcible rape and the forced unnatural rape of one seventeen-year-old and two sixteen-year-old girls.[55] Over the objections of the defendant and without the request or endorsement of the prosecution, the trial court denied the newspaper's motion for access and cleared the courtroom.[56]

The newspaper immediately demanded injunctive relief from the exclusion order and the following day the Supreme Judicial Court of Massachusetts denied that request.[57] The United States Supreme Court vacated and remanded the exclusion order.[58] On remand the Massachusetts court again dismissed the newspaper's appeal stating the closure furthered unenumerated "genuine State interests" and resulted in only a "temporary diminution" of public information.[59]

48. *Id.*
49. *Richmond Newspapers*, 448 U.S. at 580 (quoting Branzburg v. Hayes, 408 U.S. 665, 681 (1972)).
50. *Richmond Newspapers*, 448 U.S. at 580 n.17.
51. *Id.* at 581–82 n.18 ("[O]ur holding today does not mean that the First Amendment rights of the public and representatives of the press are absolute.").
52. *Id.* at 581.
53. 457 U.S. 596, 607–10 (1982).
54. MASS. GEN. LAWS ANN., ch. 278, § 16A (West 1981).
55. *Globe Newspaper*, 457 U.S. at 598.
56. *Id.* at 599.
57. *Id.* at 600.
58. *Id.* at 601.
59. *Id.* at 602.

The Globe newspaper again appealed and the United States Supreme Court finally ruled definitively that the mandatory closing law was an unconstitutional infringement of the first amendment access guarantee.[60]

The Court again cautioned that this access right was not absolute and indicated that protection of a minor *could* be a compelling interest justifying closure.[61] The Court predicated its reversal on the mandatory nature of the closure rather than the closure itself.[62] The Court stated, "A trial court can determine on a case-by-case basis whether closure is necessary. . . ."[63]

D. Press-Enterprise I

In 1984, the Court narrowed trial judges' discretion in making these case-by-case access decisions when it decided *Press-Enterprise Co. v. Superior Court of California*[64] (*Press-Enterprise I*). In this case, the defendant was accused of the rape and murder of a teenager. Voir dire for the case had been closed and the Press-Enterprise Company, a newspaper publisher, objected on first amendment grounds, asserting that the public had an "absolute right" to attend the trial which it further maintained included the voir dire proceedings.[65] The California Supreme Court denied access to the voir dire proceedings as well as to the transcript of the same indicating their intent to protect the privacy of the jurors.[66]

The United States Supreme Court reversed the closure and seal, noting that the "process of jury selection is itself a matter of importance . . . to the criminal justice system."[67] The Court stressed that voir dire has historically been open to the public[68] and could only be closed where there is an overriding "substantial probability" that an open proceeding will produce irreparable harm.[69] The Court further held that the closure had not been justified by the trial court

60. *Id.* at 610–11 n.27.

61. *Id.* at 607 ("We agree . . . that the first interest—safeguarding the physical and psychological well-being of a minor—is a compelling one.").

62. *Id.* at 607–08 ("[C]ompelling as that interest is, it does not justify a mandatory closure rule, for it is clear that the circumstances of the particular case may affect the significance of the interest.").

63. *Id.* at 608.

64. 464 U.S. 501, 513 (1984).

65. *Id.* at 503.

66. *Id* at 504.

67. *Id.* at 505.

68. *Id.* at 505–08.

69. *Id.* at 510. The Court also quoted *Globe Newspaper* stating, "Where . . . the State attempts to deny the right of access in order to inhibit the disclosure of sensitive information, it must be shown that the denial is *necessitated* by a *compelling governmental interest*, and is *narrowly tailored* to serve that interest." *Id.* (emphasis added).

through articulated findings of requisite specificity,[70] and that consideration of less sweeping alternatives to closure and total suppression of the transcript was required.[71]

E. Press-Enterprise II

In 1986, the United States Supreme Court decided a different case also titled *Press-Enterprise Co. v. Superior Court*[72] (*Press-Enterprise II*). Here it overturned a decision of the California Supreme Court which had allowed for closure of a pre-trial suppression hearing and sealing of the transcript of that hearing.[73]

This inflammatory case involved the criminal prosecution of a nurse accused of murdering at least a dozen hospital patients by lethal injection.[74] The closed preliminary hearing lasted forty-one days, producing a transcript of more than 4,000 pages.[75] During the hearing the defense offered no evidence and insisted that the transcript be sealed to conceal this fact and to prevent any prejudicial pretrial publicity.[76]

The California trial and appellate courts held that there was a reasonable likelihood of substantial prejudice to the defendant should the transcript be released.[77] The United States Supreme Court reversed, holding that a first amendment right of access attaches to preliminary proceedings[78] and that the California appellate courts failed to apply the "substantial probability" test.[79] The *Press-Enterprise II* Court specifically rejected as insufficient the lower courts' application of a less stringent "reasonable likelihood of substantial prejudice" test.[80]

In *Press-Enterprise II*, the Supreme Court outlined two complemen-

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70. *Id.* at 511.

71. *Id.* at 512. The judge suggested partial release of the transcript, closed voir dire for particularly sensitive questions and release of the answers without juror names as only some of the alternatives that could have been considered preferable to closure and seal. *Id.*

72. 478 U.S. 1 (1986).

73. *Id.* at 5–6.

74. *Id.* at 3.

75. *Id.* at 4.

76. *Id.* at 4–5.

77. *Id.*

78. *Id.* at 7 ("[T]he First Amendment question cannot be resolved solely on the label we give the event, *i.e.*, 'trial' or otherwise. . . .").

79. *Id.* at 14. The substantial probability test must be applied if the interest asserted is the right of the accused to a fair trial. It requires that preliminary hearings shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights. *Id.*

80. *Id.* The California Supreme Court, interpreting its access statute, concluded

tary factors that courts should consider when determining whether a public-press access right attaches to a criminal justice proceeding.[81] The first factor is whether there has been a tradition of access to the hearing, trial or proceeding.[82] The second factor the trial court should consider is whether public access plays a "significant positive role" in the procedure or function in question.[83] In weighing these factors a court considering an access issue should ask the following questions: Are people used to having access to this type of information and have they come to expect it? And does providing access to this information help assure justice or the appearance of justice?[84]

The "tradition" analysis is analogous to the public forum analysis applied in freedom of expression cases.[85] In public forum cases, the issue is usually whether the public and press have a first amendment right of access to use a public forum for the expression of ideas. No such right exists for non-public forums.[86] Similarly, where a court process has traditionally been closed to the public, no affirmative right of access has attached.[87] Where an avenue for communication or judicial proceeding has developed a tradition of ready public access, however, that access cannot be denied absent a compelling counter-interest requiring closure.

The Court in *Press-Enterprise II* also recommended accommodation of the "community theraputic value" function served by openness.[88] Some crimes arouse understandable "public concern, outrage, and hostility" and public awareness that law-enforcement and the judiciary are addressing the public's concern disperses what could otherwise be detrimental disillusionment and lack of confidence in the

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that "the magistrate shall close the preliminary hearing upon finding a reasonable likelihood of substantial prejudice." *Id.*

81. *Id.* at 8. "If the particular proceeding passes these tests of experience and logic, a qualified First Amendment right of public access attaches." *Id.* at 9.

82. *Id.* ("[W]e have considered whether the place and process have historically been open to the press and the public.").

83. *Id.* (citing *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982)).

84. In Offutt v. United States, 348 U.S. 11 (1954), Justice Felix Frankfurter stated, "Justice must satisfy the appearance of justice."

85. *See* Hague v. Committee For Indus. Org., 307 U.S. 496, 515–16 (1939). As first set forth in *Hague* the public forum doctrine provides that where a particular area or vehicle for communication or expression had traditionally been held forth as a "public forum" for the free expression of ideas, access to that forum could not be arbitrarily abridged. When initially set forth, the concept applied to streets and parks but has subsequently been expanded by the courts. *See, e.g.*, Pruneyard Shopping Center v. Robins, 447 U.S. 74 (1980) (shopping centers); Greer v. Spock, 424 U.S. 828 (1976) (military bases); Lehman v. City of Shaker Heights 418 U.S. 298 (1974) (transit ads); Pell v. Procunier, 417 U.S. 817 (1974) (prisons).

86. *Hague*, 307 U.S. at 515–16.

87. *Press-Enterprise II*, 478 U.S. at 19.

88. *Id.*

entire system.[89] Public trials, therefore serve to reassure the public that justice is being served and provide a sort of mass catharsis for public outrage.[90]

III. JUSTIFIABLE INFORMATION DENIAL STRICTLY LIMITED

The *Press-Enterprise II* decision establishes precedent that when the interest asserted is the right of the accused to a fair trial, the public shall have access to preliminary hearings unless specific findings are made demonstrating that, first, there is a substantial probability that the defendant's right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant's fair trial rights.[91] Aditionally, American common law and statutes serve to protect the citizen's right to access to information.[92] State courts have also given force to common law access rights.[93]

Statutory access guarantees abound. There exist both state[94] and federal[95] access statutes which function to guarantee public access to government-held information. With the passage of the Freedom of Information Act (FOIA)[96] in 1966, federal access guarantees acquired broad public recognition. Previous legislation, however, had guaranteed public access to information for decades prior to the enactment of FOIA.[97]

The legislative intent to allow the broadest possible public access

89. *Id.* at 13. *See generally* T. REIK, THE COMPULSION TO CONFESS (1959) and H. WEIHOFEN, THE URGE TO PUNISH 130–31 (1956) (refered to by the Court in *Press-Enterprise II*, 478 U.S. at 13).

90. *See Press-Enterprise I*, 464 U.S. 501 (1984). The Court stated, "When the public is aware that the law is being enforced and the criminal justice system is functioning, an outlet is provided. . . ." *Id.* at 509.

91. *Press-Enterprise II*, 478 U.S. at 14.

92. *See* 2 B. BRAVERMAN & F. CHETWYND, INFORMATION LAW: FREEDOM OF INFORMATION, PRIVACY, OPEN MEETINGS, OTHER ACCESS LAWS, Appendix 18, at 1113–17 (Practising Law Institute 1985) [hereinafter 2 INFORMATION LAW] (list of state open record statutes). *See generally* May, *Public Access to Civil Court Records: A Common Law Approach*, 39 VAND. L. REV. 1465 (1986) (information concerning common law bases for access to information).

93. *See* Paul, Ovelmen, Besvnick & Burt, *ACCESS*, 3 COMM. LAW 1988 73–191, (P.L.I. 1988) (comprehensive outline of important state-court access cases).

94. Statutes for all states are listed in 2 INFORMATION LAW, *supra* note 92, at 1148-99.

95. The principal federal access statute is the Freedom of Information Act, 5 U.S.C. § 552 (1977 & Supp. 1989). However, numerous other federal statutes contain access to information provisions. *See generally* 2 INFORMATION LAW, *supra* note 92, chs. 17–23.

96. 5 U.S.C. § 552 *et. seq.* (1966 and Supp. 1989).

97. *See* Administrative Procedure Act of 1946, 5 U.S.C. § 1002 *et. seq.* (1946). *See also* 1 B. BRAVERMAN & F. CHETWYND, INFORMATION LAW: FREEDOM OF INFORMATION, PRIVACY, OPEN MEETINGS, OTHER ACCESS LAWS, § 1-1.1 (Practising Law Institute

to "the maximum amount of information" was based on a property right theory.[98] As enunciated in 1946 by the Senate Judiciary Committee, information is "*public property* which the general public, rather than a few specialists or lobbyists, is entitled to know or have ready means of knowing with definiteness."[99] Congressional intent to maximize the information flow was reiterated in the 1974 "Sunshine Act"[100] amendments to FOIA which further expanded public access to government-held information.

In *United States Dept. of Justice v. Reporters Comm. for Freedom of the Press*,[101] the Supreme Court recently construed the FOIA and stressed that the basic policy behind the statute is to guarantee the "citizens' right to be informed about 'what their government is up to.' "[102]

A. Informed Citizenry Touchstone of Democracy

In a free and open society, the public has both a right and a need to know what its government is doing.[103] It follows that the public has a right and a need to know what their courts are doing, and why.[104] As early as 1827 Jeremy Bentham recognized that an active press is the best tool available for transmitting this information to the public:

Without publicity, all other checks are insufficient: in comparison of

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1985) [hereinafter 1 INFORMATION LAW] (discussion of the legislative history of the APA).

98. Senator Thomas C. Hennings, Jr., (D. Mo.), the original sponsor of the FOIA, attributed this purpose to the APA in 1959. *See* Hennings, *A Legislative Measure To Augment The Free Flow Of Public Information*, 8 AM. U. L. REV. 19, 22 (1959).

99. S. REP. No. 752, 79th Cong., 1st Sess. 198 (1945), *reprinted in* ADMINISTRATIVE PROCEDURE ACT; LEGISLATIVE HISTORY, S. DOC. No. 248, 79th Cong., 2d Sess. (1946). *Id.* (quoted in 1 INFORMATION LAW, *supra* note 97, § 1-1.1 at 5 n.6).

100. 5 U.S.C. § 552(b) (1974). *See generally* 1 INFORMATION LAW, *supra* note 97, § 1-5.2.1.

101. 57 U.S.L.W. 4373, (U.S. March 22, 1989) (No. 87-1379).

102. *Id.* at 4380. (*quoting* E.P.A. v. Mink, 410 U.S. 73, 80 (1973), *in turn quoting* COMMAGER, THE NEW YORK REVIEW OF BOOKS, Oct. 5, 1972, p. 7.) (Although the Court here refused to grant third party access to computerized FBI "rap sheets" through the FOIA. Their refusal was based on the privacy exception to the FOIA. *See infra* notes 143 to 144 and accompanying text.)

103. *See* 2 L. JOHNSON, PUBLIC PAPERS OF THE PRESIDENTS, 699 (1966) (quoted in Zerbinos, *The Right to Know: Whose Right and Whose Duty?*, 4 COMM. & L. 33 (1982). Upon signing the Freedom of Information Act, President Lyndon B. Johnson lauded the fact that "the United States is an *open society* in which *the people's right to know* is cherished and guarded." *Id.* at 37 (emphasis added).

104. *See* Zimmerman, *Overcoming Future Shock: Estes Revisited, or a Modest Proposal for the Constitutional Protection of the News-Gathering Process*, DUKE L.J. 641 (1980). "[T]he courts have made the judgment that the . . . right of citizens to observe and discusss the operations of the judicial system outweigh any countervailing interests of participants in secrecy." *Id.* at 693.

> publicity, all other checks are of small account. Recordation, appeal, whatever other institutions might present themselves in the character of checks would be found to operate rather as cloaks than checks; as cloaks in reality, as checks only in appearance.[105]

Throughout history, powerful governments and institutions have attempted to control the flow of information.[106] The foundation of American law, of democracy in general, is that power must reside first and foremost in the people. America is no more a government of agencies, branches and positions than a government of laws. We are a government of, by and for the people.

Knowledge is power and in a democracy, power is to reside in the citizenry, the public. Providing for the free flow of information therefore provides for the locus of power to remain with the informed citizenry. Withholding knowledge from the public runs counter to the most fundamental values of the American government. As Justice Douglas has succinctly stated, "Secrecy in government is fundamentally anti-democratic. . . ."[107]

B. Only Compelling Interest Justifies Secrecy

The public interest in the free flow of information is so substantial that courts may not restrict access except in extraordinary circumstances. "[T]he Court must weigh the effects of the imposition inhibiting access [to information] against the social interests served by the imposition."[108] As stated by Justice Brennan, the balance swings in favor of secrecy only in the presence of a "sufficiently compelling" government interest.[109]

The Supreme Court has long supported the public's inherent need to know what its officials are doing.[110] In *New York Times Co. v. United*

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105. 1 J. BENTHAM, RATIONALE OF JUDICIAL EVIDENCE 524 (1827).

106. "Through much of history a familiar pattern emerges. Those with political or ecclesiastical power frequently have sought to restrain, shape or combat information intended for the masses." W. FRANCOIS, MASS MEDIA LAW AND REGULATION 3 (1978).

107. New York Times Co. v. United States, 403 U.S. 713, 724 (1971) (Douglas, J., concurring).

108. Brennan, *Address*, 32 RUTGERS. L. REV. 173, 177 (1979).

109. Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 598 (1980) (Brennan, J., concurring).

110. *See* First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978). "[T]he First Amendment goes beyond the protection of the press and the self-expression of individuals to prohibit government from limiting the stock of information from which members of the public may draw." *Id.* at 783. *See also* Zemel v. Rusk, 381 U.S. 1 (1965). In *Zemel*, a journalist objected on first amendment grounds to the government's refusal to issue a passport allowing him to travel to Cuba to research articles and books. The State Department had issued a ban on travel to the island for safety reasons. The Supreme Court upheld the refusal and said, "The right to speak and publish does not carry with it the unrestrained right to gather information." *Id.* at 17.

States,[111] for example, the Court refused to issue an injunction against publication of the "Pentagon Papers." The papers involved information regarding allegations of defense department misconduct similar to those under investigation in the "Pentagate" cases.[112] The Supreme Court believed public access to such information should not be thwarted. In his concurring opinion, Justice Stewart stated:

> In the absence of the governmental checks and balances present in the other areas of our national life, the only effective restraint upon executive policy and power in the areas of national defense and international affairs may lie in an enlightened citizenry—in an informed and critical public opinion which alone can here protect the values of democratic government.[113]

Lower courts have also granted access to similar information. In *In re National Broadcasting Company, Inc.*,[114] the court held that the public and press had a right of access to FBI video tapes made during the course of the ABSCAM investigation of congressional corruption.[115] Post-trial access to videotapes was at issue, the trial itself was open.[116] The United States Circuit Court for the District of Columbia stated:

> [T]his case involves issues of major public importance-a high government official has been charged with . . . betraying the public trust, and law enforcement agencies have been accused of employing tactics which subvert the constitutional rights of the citizenry. Thus, although the public's First Amendment right of access to the trial itself was fully respected in this case, and although the case was reported in the press and broadcast media, we believe . . . "there remains a legitmate and important interest in affording members of the public their own opportunity to see and hear evidence that records the activities of a Member of Congress . . . as well as agents of the Federal Bureau of Investigation."[117]

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111. 403 U.S. 713 (1971).

112. *Id.* at 724. *New York Times* and the Pentagate cases both involved illegal activities of high-ranking government officials and the question of public and press access to information. Both also involve the Pentagon and, by implication, matters of national defense. *Id.*

"Pentagate" is the media's term for the government's ongoing investigation of its defense contractors. *See The Real Dangers in "Pentagate"*, U.S. NEWS & WORLD REP., Aug. 15, 1988, at 28.

113. *Id.* at 728 (Stewart, J., concurring).

114. 653 F.2d 609 (D.C. Cir. 1981).

115. *In re* Nat'l Broadcasting Co., 653 F.2d at 612. For a history of the ABSCAM investigation; see United States v. Myers, 635 F.2d 945, 947–49 (2d Cir. 1980).

116. In re *Nat'l Broadcasting Co.*, 653 F.2d at 612. The National Broadcasting Company had requested the opportunity to view the actual videotapes made by wired undercover agents of illegal Congressional deals with foreign nationals. The network also requested a copy of the tapes for public broadcast. *Id.*

117. *Id.* at 614.

C. Government Secrecy Historically Counter-Productive

Ironically, attempts to conceal information regarding the actions of the government have generally diminished rather than protected national security interests.[118] Regretting the successful suppression of information regarding the disastrous Bay of Pigs operation, for instance, President Kennedy later told the New York Times, "Maybe if you had printed more about the operation, you would have saved us from a colossal mistake."[119]

D. Access and Secrecy Must Be Balanced

The Supreme Court has nonetheless made it clear that common law and first amendment access rights must be weighed against countervailing interests such as national security, the right to a fair trial and, to a lesser degree, privacy interests, trade secret protections, and the efficacy of ongoing law enforcement efforts.[120]

1. Fair Trial

The fair trial interests of a defendant are constitutionally protected and have been termed the preeminent interest to be protected in court access cases.[121] The free press-fair trial controversy has been much discussed and essentially states that where dissemination of information or access to a judicial proceeding will render a fair trial impossible, that information can be temporarily withheld from the public since the accused's right to a fair trial must be preserved.[122]

The United States Supreme Court has made it clear that there is a right of access to trials.[123] The standard for access denial is very high and a substantial probability that a fair trial will be impossible

118. *See* Note, *A Nation Less Secure: Diminished Public Access to Information*, 21 HARV. C.R.-C.L.L. REV. 409 (1986). Far from preserving national security, excessive secrecy has actually harmed it. The nation's security (and reputation) has been impaired by the secret formulation of poorly conceived policies. Had the policymaking apparatus accomodated more criticism and open debate, it is likely that at least in some instances, waste and ineptitude could have been discovered, flawed conceptions of national objectives might have been corrected, and policies that better enhanced national security might have been pursued. *Id.* at 449.

119. F. FRIENDLY & M. ELLIOTT, THE CONSTITUTION: THAT DELICATE BALANCE 61 (1984) (quoting Kennedy discussion with New York Times Managing Editor Turner Catledge).

120. *See infra* notes 121–47 and accompanying text.

121. 1 INFORMATION LAW, *supra* note 97, § 11-6.

122. *See generally* D. Paul, R. Ovelmen, L. Besvnick & F. Burt, *ACCESS*, 3 COMMUNICATIONS LAW 1988 73–191, (P.L.I. 1988); Ponsoldt, *Balancing Government Efficiency and the Protection of Individual Liberties: An Analysis of the Conflict Between Executive Branch "Housekeeping" Regulations and Criminal Defendants' Rights to a Constitutional Fair Trial*, 19 HARV. CIV. LIB. L. REV. 350 (1984).

123. *See supra* notes 31–117 and accompanying text.

must exist to justify closing a judicial proceeding.[124] Although access to pretrial processes is not so clearly delineated, the vast majority of courts which have considered this issue have held that trial access rights do extend to pretrial proceedings.[125]

Further, in *Nixon v. Warner Communications, Inc.*,[126] the Supreme Court expressly acknowledged a presumptive right of access to judicial records.[127] This right of access carries with it a corollary duty on the part of the courts not to interfere with access.[128] Better known as the "Watergate Tapes Case," *Nixon* addressed media requests to duplicate the audio tapes introduced during the public Watergate proceedings.[129] Although it ultimately refused media requests to copy the tapes based on a technicality in federal law,[130] the Court nontheless found that a common law right of access to judicial records exists. That right is based on the public's need to monitor the judiciary and to acquire information regarding government activity.[131]

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124. 1 INFORMATION LAW, *supra* note 97, at § 11-6.

125. Pre-trial access is a somewhat murky area of law but a vast majority of state courts which have considered the question have found that trial access rights extend to pre-trial proceedings. *See, e.g.*, Phoenix Newspapers, Inc. v. Superior Court, 101 Ariz. 257, 418 P.2d 594 (1966); Arkansas Television Co. v. Tedder, 281 Ark. 152, 662 S.W.2d 174 (1983); Miami Herald Publishing Co. v. Lewis, 426 So.2d 1 (Fla. 1982); R.W. Page Corp. v. Lumpkin, 249 Ga. 576, 578–79, 292 S.E.2d 815, 819 (1982); Gannett Pacific Corp. v. Richardson, 59 Haw. 224, 580 P.2d 49, 56 (1978); State v. McKenna, 78 Idaho 647, 309 P.2d 206 (1957); State *ex rel.* Post-Tribune Publishing Co., 274 Ind. 408, 412 N.E.2d 487 (1980); Iowa Freedom of Information Council v. Wifvat, 328 N.W.2d 920 (Iowa 1983); Ashland Publishing Co. v. Asbury, 612 S.W.2d 749, 752 (Ky. App. 1980); Minneapolis Star & Tribune v. Kammeyer, 341 N.W.2d 550 (1983); Great Falls Tribune v. District Court, 186 Mont. 4233, 608 P.2d 116 (1980); Davis v. Sheriff, 93 Nev. 511, 569 P.2d 402 (1977); Keene Publishing Corp. v. Cheshire County Superior Court, 119 N.H. 710, 406 A.2d 137 (1979); State v. Williams, 93 N.J. 39, 459 A.2d 641 (1983); Westchester Rockland Newspapers v. Leggett, 48 N.Y.2d 430, 439, 399 N.E.2d 518, 523 (1979); Minot Daily News v. Holum, 380 N.W.2d 347 (N.D. 1986); State *ex rel.* Dayton Newspapers, Inc. v. Phillips, 46 Ohio St. 2d 457, 351 N.E.2d 127 (1976); Commonwealth v. Hayes, 489 Pa. 419, 414 A.2d 318 (1980); Kearns-Tribune Corp. v. Lewis, 685 P.2d 515 (Utah 1984); Herald Ass'n., Inc. v. Ellison, 138 Vt. 529, 534, 419 A.2d 323, 326 (1980); Richmond Newspapers, Inc. v. Commonwealth, 222 Va. 574, 281 S.E.2d 915 (1981); State *ex rel* Herald Mail Co. v. Hamilton, 165 W. Va. 103, 267 S.E.2d 544 (1980); Williams v. Stafford, 589 P.2d 322 (Wyo. 1979).

126. 435 U.S. 589 (1978).

127. *Id.* at 596.

128. *See* Zerbinos, *The Right to Know: Whose Right and Whose Duty?*, 4 COMM. & LAW 33 (1982). If the public has a right to court access, "[t]he correlative duty on the part of the judiciary is not to interfere with that right, except in genuinely extraordinary circumstances." *Id.* at 47.

129. *Nixon*, 435 U.S. at 591.

130. *Id.* at 603–08 (citing Presidential Recordings and Materials Preservation Act, Pub. L. No. 93-526, 88 Stat. 1695 (1974)) (following 44 U.S.C. § 2107 (1982)).

131. *Id.* at 597.

In sum, the fair trial exemption to information access is strictly limited to exceptional circumstances. It is not a concern for courtroom decorum or prosecutorial convenience which justifies access denial, but the actual probability of a miscarriage of justice.

2. *National Security*

Similarly, the constitutional "military and states secret privilege," delineated by the Supreme Court in *United States v. Reynolds*[132] is not unlimited. The military and states secrets privilege has both constitutional and legislative origins. Under either privilege, sensitive information relating to military plans, weapons, or operations, vulnerabilities or capabilities of systems, and other specified catagories of information may be closed to the public to protect national security interests.[133]

As a practical matter, most national security information is classified and subject to statutory protection.[134] Classification of sensitive information is subject to control of the executive branch based on the constitutional authority granted to the president as commander-in-chief.[135] The current classification regulation, issued in 1982, requires classification and consequent nondisclosure of certain classes of material when they may "reasonably be expected to damage" national security.[136] However, in the interest of the fullest possible public access to sensitive information, the order requires that all information be declassified or downgraded as soon as security permits.[137]

Nor is the classification system to be used as a shield for questionable government activity. The order explicitly prohibits withholding of information to protect the reputation or image of any individuals or agencies. Information may not be sealed to cover "violations of law, inefficiency or administrative error" nor to "prevent embarrassment, restrain competition or delay the release of information not properly classifiable."[138] Classified documents are specifically exempt from public access and from forced disclosure through the machinations of FOIA "exemption I," which allows for exemption by

132. 345 U.S. 1 (1953).

133. *See generally* 2 INFORMATION LAW, *supra* note 92, at § 5 (FOIA'S mandatory disclosure requirement does not apply to matters classifed as secret in the interest of national defense or foreign policy by an executive order).

134. *See, e.g.*, 5 U.S.C. § 552(b)(1) (1982). This section provides that classified documents are specifically exempt from public access and from forced disclosure through the Freedom of Information Act "exemption I," which allows for exemption by valid executive order.

135. U.S. CONST. art. II, § 2.

136. Exec. Order No. 12,356, 47 Fed. Reg. 14,874 (1982).

137. *Id.*

138. *Id. See generally* 2 INFORMATION LAW, *supra* note 92, at § 5.

valid executive order.[139]

3. *Trade Secrets*

Commercial interests and trade secrets are also protected from access demands by exemptions in FOIA and by the Federal Trade Secrets Act.[140] In *Chrysler Corporation v. Brown*,[141] the Supreme Court held that a reverse FOIA suit could be brought to prohibit access to valid trade secret information. The information must be a genuine secret, the release of which would cause actual damage to the secret holder.[142]

4. *Privacy Interests*

Personal privacy interests are also protectable, based in large part on the Privacy Act of 1974.[143] The FOIA also exempts personal information from public access where there would exist a "clearly unwarranted invasion of personal privacy."[144] Essential considerations in any privacy disclosure suit include whether the information is of an intimate nature, whether the person involved had a legitimate expectation of confidentiality, whether and to what degree that person will be harmed by disclosure and whether or not there is an overriding public interest in disclosure of the information.[145]

5. *Law Enforcement*

The FOIA also exempts from disclosure certain sensitive information regarding names of informants, information endangering the life or safety of law enforcement personnel or witnesses and specifics related to an ongoing and legitimate law enforcement proceeding when the release would irreparably harm the government's case in court.[146] The law enforcement exemption is not intended to prevent

139. Exec. Order No. 12,356, § 1.6(a), Fed. Reg. 14,874 (1982).

140. Uniform Trade Secrets Act, 18 U.S.C. § 1905 (1982). *Compare* Freedom of Information Act, 5 U.S.C. § 552(b)(4) (1982).

141. 441 U.S. 281 (1979).

142. *Id.* at 292.

143. 5 U.S.C. § 552(b)(6) (1982).

144. *Id. See especially,* U.S. Dept. of Justice v. Reporters Comm. for Freedom of the Press, No. 57 U.S.L.W. 4373, 4382 (U.S. March 22, 1989) (No. 87-1379). Here the Court refused to grant reporters access to individual FBI "rap sheet" compilations of pre-arrest, arrest, pre-trial and conviction data. The court construed the privacy exemption to the FOIA and held categorically that such third-party requests for law-enforcement records about private citizens "can reasonably be expected to invade that citizen's privacy, and that when the request seeks no 'official information' about a Government agency, but merely records that the Government happens to be storing, the invasion of privacy is 'unwarranted'." *See generally* 2 INFORMATION LAW, *supra* note 92, at ch. 21.

145. *See id.*

146. 5 U.S.C. § 522(b)(7) (1982 & Supp. IV 1986).

the release of information already available to an investigation subject nor is it intended to protect against adverse publicity. The integrity of the law enforcement effort is the protected interest—not the information itself.[147]

IV. CASE: IN RE *SEARCH WARRANT*

The Court of Appeals for the Eighth Circuit, in its 1988 decision in *In re Search Warrant for Secretarial Area Outside Office of Thomas Gunn, McDonnell Douglas Corp.*,[148] denied the public access to information regarding a pre-trial judicial proceeding while acknowledging in the same opinion that the public and press have a first amendment right to that information.[149] At issue was a lower court's seal of the court docket, search warrant applications and supporting affidavits issued in conjunction with a nationwide investigation of alleged irregularities and outright fraud in the nation's defense contracting industry.[150]

Addressing the public's interests in the efficient and appropriate machinations of the national defense industry, the Federal Bureau of Investigation and the Naval Investigation Service had, for the past two years, conducted a comprehensive undercover investigation of reported irregularities and fraud throughout the defense industry.[151] In June of 1988, the investigation resulted in the simultaneous issuance of more than forty separate search warrants for strategic defense contracting persons and corporations nationwide.[152]

Although the lengthy investigation culminated in the tactical simultaneous issuance of warrants, the investigating agents apparently believed that continued secrecy concerning contents and subjects of the warrants would in some way facilitate law enforcement efforts.[153] Some of the warrants together with supporting affidavits as court documents for some of the investigation subjects were sealed by various district courts.[154] Among the sealed warrants were those for

147. *See id. See generally* 1 INFORMATION LAW, *supra* note 97, at § 11.

148. 855 F.2d 569 (8th Cir. 1988).

149. *Id.* at 575. "[W]e hold that the qualified First Amendment right of public access extends to the documents filed in support of search warrants and the documents may be sealed if the sealing is necessary to protect a compelling government interest and that less restrictive alternatives are impracticable." *Id.*

150. *Id.* at 571. *See also In re Search Warrant for Secretarial Area*, No. 88-MISC-260, slip op. at 3,4 (E.D. Mo. July 15, 1988)(district court seal order and extension).

151. *See Search Warrant*, 855 F.2d at 570. The investigation involved Pentagon officials and consultants and defense contracting companies and their officials. *See* Rosenbaum, *Pentagon Fraud Inquiry: What is Known to Date*, N.Y. Times, July 7, 1988, at 1, col. 3, for a list of the companies and people involved.

152. *Search Warrant*, 855 F.2d at 570.

153. *See supra* notes 7–14 and accompanying text.

154. Affidavits regarding some of the warrants were not sealed. *Search Warrant*,

Thomas Gunn and his secretary, both employees of St. Louis-based McDonnell Douglas Corporation, one of the nation's largest defense contractors.[155] On July 6, 1988, more than three weeks after the warrants were first issued, and after informal requests for access to the warrants and supporting materials went unanswered, the *St. Louis Post Dispatch*, an editor, and its publisher, filed a motion to unseal the affidavits.[156] The next day, a detailed article outlining the subjects of the warrants issued and the probable purpose for each, appeared on the front page of the *New York Times*, effectively eliminating any previously legitimate secrecy argument the government may or may not have had.[157]

Nonetheless, the next week, following deliberation on the motion to unseal and the McDonnell Douglas response (which response was itself placed under seal) the District Court for the Eastern District of Missouri not only upheld the seals on all the documents and the court docket, but extended the seal period.[158] The Court of Appeals for the Eighth Circuit expedited review and heard oral argument on the appealed seal order later in July.[159] It, too, upheld the seals on the search warrants and supporting affidavits while making the then inconsequential gesture of ordering the district court docket unsealed.[160] The Eighth Circuit prefaced its denial of public and press access to the documents with a first-impression opinion that the first amendment right of public access extends to the documents filed in support of search warrant applications.[161]

V. Access Deferred is Access Denied

The court of appeals' declaration in *In re Search Warrant* that an access right exists for pretrial documents deserves commendation. However, its refusal to unseal the "Pentagate" court records involved, even after the information they contained had been made public through alternate means, is inexpicable.[162] Closure could not

855 F.2d at 577. The seals on others were allowed to expire "due to government inadvertence." *Id.* at 575.

155. *Id.* at 571.

156. *Id.* (the motion was filed pursuant to Fed. R. Crim. P. 41. (West, 1988)).

157. N.Y. Times, July 7, 1988, at 1, col. 1.

158. *Search Warrant*, 855 F.2d at 571. *See also In re Search Warrant for Secretarial Area.* No. 88-MISC-260, slip. op. at 3–4 (E.D. Mo. July 15, 1988) (district court seal order and extension).

159. *Search Warrant*, 855 F.2d at 571.

160. The court of appeals noted that sealing the court docket was overzealous and indicated "an abundance of caution" on the part of the district court. "The case dockets maintained by the clerk of the district court are public records." *Search Warrant*, 855 F.2d at 575 (quoting United States v. Criden, 675 F.2d 557 (3rd Cir. 1984)).

161. *Search Warrant*, 855 F.2d at 575. *See also supra* note 17 and accompanying text.

162. The newspapers of the nations have devoted extensive press coverage to the investigation. . . . The government has briefed congressional committees

have served a compelling government secrecy interest but access would have met a valid and significant public interest. Closure serves merely to reinforce the public's disillusion with the defense industry, the judicial system and their government in toto. In the words of the United States Supreme Court, "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing."[163]

A. Pre-trial Document Access Issue

Although only dicta, given the resultant ongoing seal, the pretrial document access declaration is consistent with the Supreme Court's judicial access rationale.[164] The Court of Appeals for the Eighth Circuit reasoned that search warrant applications and receipts are routinely filed openly with the court, that judicial records are historically open to public inspection and that public access to such documents serves an important public information function.[165] The court further acknowledged that, like voir dire, search warrants, while not part of a trial per se, are an "integral part of a criminal prosecution" and "are at the center of pre-trial suppression hearings."[166] This reasoning was directly in line with both constitutional and common law access theory.

The court of appeals' decision in *In re Search Warrant* attempted to exhibit compliance with each of the Supreme Court's requirements for permissible access denial laid out in *Gannett*, *Richmond Newspapers*, *Globe Newspaper*, *Press-Enterprise I* and *Press-Enterprise II*.[167] The court of appeals did not deny access to an entire trial, as is forbidden by *Gannett* and *Richmond* when read together.[168] Rather, it denied access to certain court documents.[169] Regardless of the merits of its conclusions, the Eighth Circuit did "articulate" its reasons for clos-

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> on both the scope and the specifics of the investigation . . . affidavits have been released to the public. Indeed a strong argument can be made that *all of those involved with the investigation, as targets or otherwise, know its details*, and *only the general public remains in the dark*.

Search Warrant, 855 F.2d at 576 (Heaney, J., concurring and dissenting) (emphasis added).

163. *Richmond Newspapers*, 448 U.S. at 572 (1980).

164. *See supra* notes 35–90 and accompanying text.

165. "[S]earch warrant applications and receipts are routinely filed with the clerk of court without seal." *Search Warrant*, 855 F.2d at 573. "[P]ublic access to documents filed in support of search warrants is important to the public's understanding of the function and operation of the judicial process and the criminal justice system and may operate as a curb on prosecutorial or judicial misconduct." *Id.*

166. *Id.*

167. *See supra* notes 35–90 and accompanying text.

168. *See supra* notes 35–52 and accompanying text.

169. *Search Warrant*, 855 F.2d at 573.

ing the records in its opinion, as required by *Richmond*.[170] The Court of Appeals' closure of the documents was also based upon an independent request regarding a particular case and was not a blanket policy decision to close all such records.[171] Closure not based on the facts of a particular case is forbidden by the Supreme Court's decision in *Globe*.[172]

B. Seal Not Justified by Compelling Interest in Secrecy

Ultimately, however, the reasoning proved for naught since the court of appeals held that the government's ongoing investigation was a compelling enough state interest to justify maintaining the seals.[173] While meaningful discussion of the precise content of the sealed information is impossible, the court indicated that the supporting affidavits included transcripts of wiretaps, details regarding the individuals and specific projects involved and reveal "the nature, scope and direction of the government's ongoing investigation."[174]

Admittedly these are the types of information which the FOIA law enforcement exemption from access addresses. It is also likely that the investigation was "ongoing" and the warrant issuance was not a final resolution.[175] However, since the information regarding the warrant recipients and their ties to the scandal had been detailed in the press,[176] any FOIA exemption rationale would have been moot.[177]

The access denial was predicated on the need for continuing secrecy to protect the government's ongoing investigation.[178] However, as Judge Heaney noted in his concurring and dissenting opinion, details regarding the Pentagon officials, consultants, defense contractors and corporate officials under investigation had already been front page news in the nation's newspapers.[179]

The need for secrecy, had it ever existed, was long gone. Not only had the individuals and corporations actually under scrutiny been alerted to the government investigation by virtue of personal service of subpoenas,[180] the remainder of the defense industry and the public at large had been put on notice by the press.[181] Any "destruction

170. *Richmond Newspapers*, 448 U.S. at 452.
171. *Search Warrant*, 855 F.2d at 574.
172. *Globe Newspaper*, 457 U.S. at 603–06.
173. *Search Warrant*, 855 F.2d at 574.
174. *Id.*
175. 5 U.S.C. § 522(b)(7) (1982).
176. *See supra* note 3 and accompanying text.
177. *Search Warrant*, 855 F.2d at 576 (Heaney, J., concurring and dissenting).
178. *Id.*
179. *Id. See also* N. Y. Times, July 7, 1988 at 1, col. 1.
180. *Search Warrant*, 855 F.2d at 576 (Heaney, J., concurring and dissenting).
181. *Id.*

of documents" or "evidence tampering" the court attempted to prevent through sealing the court records had long since taken place.

C. *Less Sweeping Alternative to Seal Rejected*

In keeping with the holding in *Press-Enterprise I*, the court apparently considered "less restrictive alternatives" to sealing the records.[182] Total denial of access is not permissible if less restrictive alternatives exist.[183] However, the court summarily dismissed the alternatives, such as line-by-line reduction and partial dissemination, as "impracticable."[184] Assuming that the search warrant information contained protectable secrets, and apparently it did not,[185] line-by-line reduction should have been utilized.

It is not enough that this was deemed "impracticable."[186] Administrative convenience is not the compelling interest mandated by the Supreme Court in *Press-Enterprise I* for denial of access to court documents. For as Chief Justice Burger has said, "All of the alternatives [to absolute closure or seal] admittedly present difficulties for trial courts, but none of the factors relied on here [is] beyond the realm of the manageable."[187] Judicial protection for bureaucratic or law enforcement officials should not be allowed to supercede the public's right to know. The court of appeals should have stepped aside and awarded access in fact as well as in principle.[188]

D. *Overriding Public Interest in Scandal Investigation*

The court further failed to adequately address the factors set forth by the Supreme Court in *Press-Enterprise II*.[189] Under that test, the seal of the search warrant and affidavit would almost certainly have been denied. The first factor of the test asks whether access has been traditionally available.[190] Here, as the court of appeals correctly noted, the answer is clear: search warrants, affidavits, and, most as-

182. *Search Warrant*, 855 F.2d at 574. *Press-Enterprise I* addressed the issue of a California trial court judge's failure to consider alternatives to closure of a publicized rape trial. *Press Enterprise I*, 464 U.S. at 513.

183. *See Search Warrant*, 855 F.2d at 574.

184. *Id.*

185. *Id.* The government's argument for closure was that its ongoing investigation would be jeopardized by disclosure, not that protectable secrets were contained in the warrants. *Id.*

186. *Id.*

187. *Richmond Newspapers*, 448 U.S. 555, 581 (1980).

188. This American government,—what is it but a tradition, though a recent one, endeavoring to transmit itself unimpaired to posterity, but *each instant losing some of its integrity*?. . . *[T]his government never of itself furthered any enterprise, except by the alacrity with which it got out of its way.*

H. THOREAU, ON THE DUTY OF CIVIL DISOBEDIENCE 1 (1844) (emphasis added).

189. *Press-Enterprise II*, 478 U.S. at 8.

190. *Id.*

suredly, court dockets have traditionally been maintained without seal.[191]

The second factor of the *Press-Enterprise II* test asks whether affording access will serve a "community therapy" function.[192] The court of appeals failed to address this public interest function. Public indignance is justifiably roused by the seemingly endless allegations of senseless cost-overruns and outright fraud levelled against the nation's defense industry.[193] It is difficult to imagine a public policy issue with more direct impact on our democratic society, its citizens, or its future than nationwide fraud in our government defense contracting industry.[194] The existence of waste and duplication as well as the possibility of wide-spread fraud on the part of the Department of Defense, the various branches of the armed forces and the defense contracting industry as a whole gives rise to fundamental questions facing a concerned public.[195]

Questions raised by the spectre of Pentagate include: Are our elected officials and their appointees behaving as we want them to? Is our government as a whole doing what we want it to do? Is it doing what the law says it must do? Are our law enforcement agents acting to uphold the law? Are our tax dollars being spent wisely? Is our national defense secure? What are the courts doing about it? These are question which the public properly asks and to which they deserve an answer.

The drafters of the Constitution intended that issues relating to taxes, national defense, government fraud, law enforcement, the machinations of the judiciary should be openly discussed.[196] These are precisely the sorts of issues upon which public debate is mandated[197] and to which the first amendment has particular relevance.[198] The public is clearly interested in and outraged by the

191. *See supra* notes 67–71 and accompanying text.

192. *See supra* notes 88–89 and accompanying text.

193. *See also supra* notes 4–5 and accompanying text.

194. *Search Warrant*, 855 F.2d at 576 (Heaney, J., concurring and dissenting).

195. *Id.* at 576. "The First Amendment . . . [has] a common core purpose of assuring freedom of communication on matters relating to the functioning of government." *Richmond Newspapers*, 448 U.S. at 575.

196. James Madison, author of the first amendment stated: "A popular government, without popular *information or the means of acquiring it* is but a prologue to a farce or a tragedy; or perhaps both. Knowledge will forever govern ignorance. And a people who mean to be their own governors, must arm themselves with the power knowledge gives." J. MADISON, THE COMPLETE MADISON 337 (S. Padover, ed. 1953) (emphasis added).

197. As the Supreme Court indicated in *Globe Newspapers*, access is protected "to ensure that this constitutionally protected 'discussion of governmental affairs' is an informed one." *Globe Newspapers*, 457 U.S. at 604–05 (quoting Mills v. Alabama, 384 U.S. 214, 218 (1966)).

198. "Congress shall make no law . . . abridging the freedom of speech, or of the

allegations arising from the Pentagate investigation.[199] Full knowledge regarding the investigation would most assuredly serve to reassure a disenchanted electorate that their law enforcement and judicial officials are acting within the scope of the law, even if Pentagon officials are not.

Balancing the government's security needs against the public's need to know is vital.[200] Blanket or automatic government authorization to withhold information regarding issues important to an informed citizenry undermines the strength of the republic. This danger is particularly serious where the government "secret" involves the ineptitude or outright illegality of government actions.[201]

CONCLUSION

In *In re Search Warrant*, the Court of Appeals for the Eighth Circuit significantly encroached upon the right of the public and the press to access information regarding the working of their government.[202]

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press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." U.S. CONST. amend. I. The free speech-press clause was intended to "prevent the government from interferring with the communication of facts and views about governmental affairs, in order that all could properly exercise the rights and responsibilities of citizenship in a free society. *This clause was intended as one of the guarantees of the people's right to know.*" Parks, *The Open Government Principle: Applying the Right to Know Under the Constitution*, 26 GEO. WASH. L. REV. 1, 3 (1957) (emphasis in original).

199. "Knowledgeable United States Senators have reported that the amount of public funds involved reaches the hundreds of millions of dollars." *Search Warrant*, 855 F.2d at 576 (Heaney, J., concurring and dissenting). "[T]he defense contract and procurement scandal in this country represents a public concern of great immediacy and magnitude." *Id.*

200. By not weighing the value to the public of knowing about particularly relevant episodes in the [nation's] intelligence agencies' history, we may undermine the public's ability to assess the government's performance of it's duty . . . with no mechanism in the system for balancing the public's right to know with possible risks to security, [denial of access] can also result in the permanent loss of information critical to public debate.

McGehee v. Casey, 718 F.2d 1137, 1150 (D.C. Cir. 1983) (Wald, C.J., separate statement).

201. Refusing to seal divorce court documents involving alleged misconduct of a local official, a court held that the public has a "vital interest in acquiring information about official wrongdoing." George W. Prescott Publishing Co. v. Public Register of Probate, 11 MEDIA L. REP. 2331 (Mass Sup. Jud. Ct. 1985). *See generally* Comment, *A Nation Less Secure: Diminished Public Access to Information*, 21 HARV. C.R.-C.L. L. REV. 409 (1986).

202. *When men govern themselves, it is they—and no one else— who must pass judgment upon unwisdom and unfairness and danger.* And that means that unwise ideas must have a hearing as well as wise ones, unfair as well as fair, dangerous as well as safe. . . . Just so far as, at any point, the citizens who are to decide an issue are denied acquaintance with information or opinion or doubt or disbelief or criticism which is relevant to that issue, just so far the result much be ill-considered, ill-balanced planning for the general good. . . *The principle of freedom of speech springs from the necessities of the program of self-government.*

While the court is to be applauded for its conclusion that the first amendment entitles the press and the public to search warrant filing information, its refusal to grant that same access in *In re Search Warrant* is ominous. Both the public and the press have reason to be wary of this gratuitous grant of power to law enforcement agencies and enshrouding of the judicial process.

Julie Esther Keller

Meiklejohn, *Political Freedom*, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES, Vol. 1, at 9 (Dorsen, Bender and Neuborne, eds., 4th ed. 1976) (emphasis added).